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[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 661.]

3. Appeal and Error—Review—Findings of Fact.—The finding of the jury that one who stumbled over a stone 6 inches square, set in and projecting 6 inches above the surface of a sidewalk, was not guilty of contributory negligence, cannot be disturbed; there being evidence tending to support it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

BURTON et al. v. FRANK A. SEIFERT PLASTIC RELIEF CO

June 11, 1908.

[61 S. E. 933.]

1. Principal and Surety—Remedy of Creditor—Nature of Action on Bond—Pleading.—An action by a subcontractor against building contractors and their surety on a bond binding them to pay for labor and material used, to recover a balance due under the subcontract, must be regarded as a suit on the bond, and not on the subcontract, though the subcontract was filed in the clerk's office when the declaration was filed, where it was no part of the pleadings, and the declaration made every allegation necessary for a suit on the bond.

2. Pleading—Demurrer—Question of Fact.—In an action by a subcontractor against building contractors and their surety, on a bond binding them to pay for labor and material used, to recover a balance due under the subcontract, whether the subcontractor had complied with the subcontract was a matter of fact, which could not be questioned on demurrer to the declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Pleading, § 535.]

3. Courts—Conflicting Jurisdiction—State and United States Courts—Statutes—Repeal—Retroactive Effect.—Under Rev. St. U. S. 1878, § 13 (U. S. Comp. St. 1901, p. 6), providing that the repeal of a statute shall not release any liability incurred under it, in the absence of express provision to that effect, and that the statute shall remain effective to sustain any proper action to enforce such liability, a subcontractor having sued in a state circuit court government building contractors and their surety on a bond given under Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523) binding them to pay for all labor and material used for a balance due under the subcontract, the subsequent enactment of Act Feb. 14, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), limiting jurisdiction of such actions to the federal circuit courts, did not oust the state court's jurisdiction; that act not disclosing an intent to affect existing actions.

4. Statutes—Retroactive Operation.—There is a presumption against retroactive legislation, and words in a statute will not be construed as having a retroactive effect unless they clearly have no other effect, and the legislative intent cannot otherwise be satisfied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 344.]

5. Appeal and Error—Reversal—Formal Defects—Depositions—Use in Evidence—Objections—Defective Certificate.—It was not reversible error to admit depositions to be read, though they were not properly certified, a mere matter of form which could have been corrected had the objection been made in due time; there being no objection to the legality of the evidence contained in the depositions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4540-4545.]

6. Same—Harmless Error—Admission of Evidence—Letter Press Copies—Preliminary Proof.—It was not prejudicial error to admit letter press copies of letters because proper notice to produce the originals had not been given, where, when called upon to produce the originals after objecting to the copies, the party holding them refused to do so, complaining that the notice was too short; it being reasonably inferable that the originals were then in court, or that they could have been readily produced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

7. Evidence—Best and Secondary—Notice to Produce.—The question of reasonable notice to produce original letters, to make letter press copies admissible, is a relative one, and, in the absence of statutory requirement, depends upon the circumstances of each case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 646-656.]

8. Customs and Usages—Building Contracts—Question for Jury.—In an action to recover a balance due from contractors to subcontractors on the subcontract, the questions whether there was a custom requiring contractors to leave their scaffolds for the use of subcontractors, and whether the parties expressly or impliedly contracted respecting the custom, etc., held, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Customs and Usages, § 47.]

9. Appeal and Error—Review—Parties Entitled to Allege Error—Estoppel.—Defendants may not complain of the admission of evidence on a given subject, where they offered evidence on it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3597.]

10. Same—Insufficient Presentation of Objection—Admission of Testimony.—An exception to a question asked a witness and the answer will not be reviewed, where the exception does not bring the evidence preceding the question to the attention of the court, but leaves the court to examine the whole of the preceding evidence to determine whether the question and answer were proper.

11. Evidence—Official Documents—Government Reports.—A government building inspector's report, made in the line of his duty, when verified, is to be regarded as an official public document, admissible in evidence under proper circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1247.]

12. Principal and Surety—Remedies of Creditor—Action on Bond of Building Contractor—Evidence.—On an issue in an action by a subcontractor against government building contractors and their surety to recover a balance due on the subcontract, whether the subcontractor failed to make good a guaranty that plaster would remain in a good condition until a specified time, the subcontractor could show by a government building inspector's report that the contractors failed to use proper paint, as required by their contract; thus preventing the subcontractor from fulfilling its guaranty.

13. Contracts—Building Contracts—Performance—Defects—Repairs—Liability of Subcontractor.—If a subcontractor on a government building performed his contract, and the work was accepted by the government and paid for by the contractors and subsequent repairs required were not caused by the subcontractor, but by the contractors' failure to perform their contract, the subcontractor is not liable to the contractors for any part of the cost of such repairs.

14. Trial—Instructions—Requests—Matters Covered by Instructions Given.—Instructions given having clearly and fairly submitted to the jury the determination of the facts the evidence tended to prove, objections to the refusal of further instructions will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

15. United States—Contracts—Government Buildings—Contractors' Bonds—Effect.—Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), requiring a government building contractor to give a bond to pay all persons supplying labor and materials, makes the surety liable to a subcontractor for the subcontractor's profits, the act not restricting liability to the value of labor and materials furnished.

16. Appeal and Error—Review—Verdict—Conclusiveness.—Findings of a jury, upon full evidence and correct instructions, and approved by the trial judge, will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]